THE ABSTRACT

FALL 2005

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

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PRESIDENT'S COLUMN

E. Howell Crosby

Dear Fellows:

Do you know what it means to miss New Orleans? Over 100 Regents, State Chairs, Committee Chairman, Fellows and their guests do. We were fortunate given the devastating effect Hurricane Katrina inflicted on the Crescent City to have held our 2005 Regents' Meeting in New Orleans at the luxurious Windsor Court Hotel. From the opening dinner at Commander's Palace, to slow mule drawn carriage rides through the French Quarter, to sipping cocktails overlooking the Mississippi River on a clear moonlit evening, everyone seemed to savor and enjoy the history, grace, beauty and romance of this great Southern City.

Fortunately, the only Hurricanes we encountered in April were those consumed in the piano bar at Pat O'Brien's. Despite the fun, we did find time to successfully tackle a very long agenda of items during the actual Regents' Meeting.

One of the most important matters addressed was the amendment to the ACMA bylaws to allow the inclusion of Canadian lawyers as Fellows of the College. I am especially grateful to Marvin Quattlebaum and his Bylaws Committee for the tremendous amount of work they provided this year.

Additional thanks go to Nyal Deems and Rob Krapf for the seamless transition of the Coordinator of State Chairs from Nyal to Rob. Through their hard efforts, we were able to identify states where the College was underrepresented and to work with Fellows in those areas to locate and nominate high quality lawyers for fellowship consideration. As a direct result, we are pleased to welcome 42 new Fellows, two of whom hail from Canada. The other forty cover 23 states and the District of Columbia.

In addition, the College now boasts a new and improved nomination form to replace the old one which has been used since 1990. The new form, which may be found on the ACMA website, is in sync with the guidelines for membership as established by the Board of Regents (found at the back of the Roster) and as followed by the Membership Committee in its consideration of nominees for fellowship to ACMA. We ask that all future nominations be submitted on the new form, a copy of which has been reprinted in this issue of the Abstract for your review.

The 2005 ACMA Mortgage Law Summary is now complete and ready for distribution. The College owes tremendous gratitude to Craig Anderson and Larry Hicks for coordinating the revisions for this edition. The 2005 Summary is dedicated to the memory of Jim Rose who organized and completed the first Summary and later served as president of ACMA. Jim passed away suddenly in December, 2004 at the age of 69. I also appreciate the time and commitment given by those Fellows in each state who prepared the revisions to the individual state sections of the Summary.

One of the observations I made over the past year, is that for a significant portion of the time the president appears to be nothing more than a spectator watching the skill and precision of our administrative staff as they keep the day-to-day activities of the College running flawlessly. Bev Levy and Grace Jan made my life easy and filled me with the assurance that the administration of ACMA is in very capable hands.

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Special Purpose Entities

by Kathleen O. McKune, Stites & Harbison, PLLC

The increasing use of limited liability companies and capital markets in real estate lending transactions, through commercial, mortgage-backed securities requires both attorneys and business professionals practicing in this area to understand how the special purpose entity ("SPE") works.

An important area to master is the reasoning behind the use of the SPE. Commercial mortgage loans do not have the same standardization and "homogenization" as residential mortgage loans because of the potentially different economic characteristics of each property. This lack of standardization, if left unregulated, could lead to substantial risks in purchasing these kinds of securities. SPE provisions are an attempt to create uniformity among the loans within the securitized pool and to reduce certain potential economic risks that are often inherent in commercial real estate.

The goal in drafting special purpose entity requirements is to create "an entity which is unlikely to become insolvent as a result of its own activities and which is adequately insulated from the consequences of any related party's insolvency." The securitized lender is underwriting the loan based on the current or projected performance of the asset and wants to take steps to insure that the asset will continue to perform in this state.

Securitized lenders do not want the borrower to have any ability to co-mingle the income generated from the mortgaged asset with any other property. If a developer owns a number of properties, and only the mortgaged asset is performing well, the lender does not want the borrower to have any ability to transfer income away from the mortgaged asset to an underperforming asset.

Ms. McKune's article "Special Purpose Entities -- Who, What, Why, Where, When and How?" appeared in the Nov. 2004 edition of "The Practical Real Estate Lawyer." She originally presented this information to the ABA Real Property and Probate Symposia during May 2004. Ms. McKune is an attorney in Stites & Harbison's Louisville office. She is a fellow of the American College of Mortgage Attorneys and serves as the state chair for Kentucky for ACMA. For more information, contact her at 502/681-0445 or kmckune@stites.com.

Uniform Assignment of Rents Act

by Norma J. Williams*

The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), at its Annual Meeting on July 22-29, 2005, adopted a final version of the Uniform Assignment of Rents Act. The approved text of the Act can be found on-line at http://www.law.upenn.edu/bll/ulc/maripp/2005AMAppText.htm.

Originally modeled in part on the California law codified at California Civil Code Section 2938, the Act seeks to resolve numerous issues that have arisen under state law and federal bankruptcy law on issues including the characterization of rents, the perfection and enforcement of the assignments, priorities as between rents assignees and other persons with an interest in rents and use of rent proceeds after collection. The Act would constitute a major, comprehensive revision to the law in most states.

As of this writing, the Act (with Official Comments) is awaiting the final approval of the ABA Real Property, Probate and Trust Section and thereafter will be moved through the NCCUSL enactment process.

A summary of the major provisions of the Act is as follows:

1. Enforceable Security Interest Also Creates an Assignment of Rents. Under Section 4 of the Act, an enforceable security instrument (e.g. mortgage, deed of trust, etc.) creates an assignment of rents from the real property described in the instrument unless the instrument provides otherwise. Thus, a lender with such a security instrument would have an assignment of rents whether or not there is a separate assignment of rents document and whether or not the security instrument has assignment of rents provisions in it. The lender's remedies with respect to an assignment of rents that exists solely because of the security instrument are limited if the real property is occupied by the borrower as its principal residence (see Paragraphs 6 and 7 below).

2. All Assignments Create Security Interests. Under Section 4 of the Act, an assignment of rents creates a presently effective security interest in all accrued and unaccrued rents from the real property. This is the result whether the document is denominated absolute, absolute conditioned upon default, as additional security or otherwise.

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3. Recordation as Perfection; Priority; Future Advances. Section 5 provides that recordation of the document creating the assignment of rents constitutes perfection, notwithstanding any provision of the document or state law that would defer enforcement until the occurrence of a subsequent event. Once perfected, the security interest has priority over a person who acquires a judgment lien against the rents or the property or a person who purchases an interest in the rents or the property. The assignment of rents has the same priority with respect to future advances as the assignee's security interest in the real property.

4. Methods of Enforcement (General). Section 6 of the Act provides that an assignment of rents may be enforced pursuant to Section 7, 8 or 9 of the Act. From the date of enforcement, the assignee (or receiver, if enforcement is by appointment of a receiver) may collect all rents that have accrued but remain unpaid on that date and all rents that accrue on or after that date.

5. Enforcement by Appointment of a Receiver. Section 7 governs enforcement by appointment of receiver and covers entitlement, grounds and priority where more than one assignee is entitled to appointment of a receiver. The Act also sets forth the actions in connection with which an assignee may file an action for appointment of a receiver and provides for notice of the application for appointment to be given to any other person that held a recorded assignment of rents in the property 10 days before the petition is filed.

6. Enforcement by Notification to Assignor. Section 8 governs enforcement by notification to the assignor upon the assignor's default and provides for copies to other rent assignees that had such interests 10 days prior to the notification date (but failure to give such notice to other assignees does not affect the validity of the notice to the assignor). An assignee that has an interest in rents solely by virtue of Section 4(a) (i.e. because it has a security interest in the underlying real property) cannot use the Section 8 method of enforcement if the assignor occupies the real property as the assignor's primary residence.

7. Enforcement by Notification to Tenants. Section 9 governs enforcement by notification to the tenant(s). Copies of the notification are to be given to other rent assignees that had such interests 10 days prior to the notification date (but failure to give such notice to other assignees does not affect the validity of the notice to the tenant). The Section provides for the content of the notice, the duties of the tenant after receipt of the notice, the effect of payment or non-payment by the tenant after receipt of the notice, the giving of payment notices by more than one assignee and other matters. An assignee that has an interest in rents solely by virtue of Section 4(a) cannot use the Section 9 method of enforcement if the assignor occupies the real property as the assignor's primary residence.

8. Form of Notification to Tenant. Section 10 contains a form of notification to tenant(s) that would satisfy the requirements of Section 9.

9. Non-Effects of Enforcement, Application and Payment. Section 11 sets forth several items that enforcement does not do, including making the assignee a mortgagee in possession, making the assignee an agent of the assignor, constituting an election of remedies affecting enforcement of the secured obligation or violating any one-action or antideficiency rule.

10. Application of Collected Rents. Section 12 sets forth, in order, the items to which rents collected are to be applied unless otherwise agreed (expenses of enforcement, expenses of preservation, secured obligation, junior interests and finally to the assignor).

11. Application of Rents to Expenses of Protecting the Property. Section 13 sets forth the rules regarding application of rents to expenses of protecting the real property and provides that unless otherwise agreed by the assignee, the assignee has no duty to apply rents to those expenses. Unless a tenant has waived its right to do so, the rights of the assignee are subject to the terms of the agreement between the assignor and the tenant and any claim or defense arising from the assignor's non-performance of that agreement. If state law other than the Act allows it, a tenant may request the appointment of a receiver on the grounds that nonpayment of expenses of protecting and preserving has caused or threatened harm to the tenant's interest in the property.

12. Duty to Turnover Rents After Enforcement; Identifiable Proceeds. Section 14 covers the duty of the assignor to turn over rents to the assignee if the assignor received them after an enforcement action taken by the assignee. It also provides for the continuation of the assignee's security interest in identifiable (as defined) proceeds and provides remedies for failure to turn over. The Section addresses

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rights as between a senior assignee and a junior assignee who has already enforced its security interest in rents.

13. Conflicting Interests Under Article 9. Section 15 addresses the potential priority conflicts that might arise with regard to proceeds (personal property received or collected on account of a tenant's obligation to pay rent) that are identifiable as between a lender holding an assignment of rents and another creditor that claims a security interest in those proceeds ("conflicting interest") arising under or governed by Uniform Commercial Code Article 9. The Section sets forth rules for cash proceeds and for noncash proceeds.

14. Other Provisions. Other provisions of the Act address definitions (Section 2), the manner of giving notification under the Act (Section 3), the ability of a party to subordinate its interest (Section 16) and the applicability of the Act to security interests signed and delivered before the effective date of the Act, security interests where enforceability, perfection and priority of security interest were accomplished prior to the effective date and actions or proceedings commenced before the effective date (Section 20).

* Norma Williams is the principal in Williams & Associates in Los Angeles, California. Her practice focuses on commercial finance transactions and acquisition and disposition transactions. She has been the ACMA Observer to the Drafting Committee for the Act. She chaired the Secured Transactions Law Reform Committee of the California State Bar Real Property Section, the Committee that drafted California's comprehensive assignment of rents law upon which the NCCUSL Act is in large part based.

Bankruptcy Code Revisions Effective October 17th

by Douglas J. Smart, ACMA Legislation Committee
and Mark D. Northrup, Graham & Dunn PC

Most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256) are effective October 17, 2005. Features of the new law that are likely to be of greatest interest to financial institutions and lenders' counsel are the following:

CONSUMER CASES

Means Testing
The overriding theme of the consumer sections of the new law is that persons who have some ability to pay their creditors should do so and should not be allowed to obtain a quick discharge of their debts.

Under the new law, an individual cannot obtain a Chapter 7 discharge over the objection of the bankruptcy trustee or creditors, and the individual must make payments to creditors through a five-year Chapter 13 (or Chapter 11) plan, if the individual's income is greater than the median income for the state in which the bankruptcy is filed and either:

(i) The individual's income available for payment of pre-bankruptcy debts is greater than $166.66 per month; or

(ii) The individual's income available for creditors is between $100 and $166.66 per month and, when multiplied by 60, the total is equal to at least 25% of the individual's general unsecured debts.

A state's "median income" is based on the most recent U.S. census data adjusted for subsequent years by the consumer price index. For example, Washington's median income in 1999 for a family of four was $61,389; and from January 2001 to January 2005, the CPI increased 8.9%.

Proponents of the new law predict that "means testing" will force 7% to 10% of bankruptcy filers into Chapter 13 and will generate a recovery by creditors of perhaps $3 billion of the $40 billion in debt that is otherwise discharged annually through bankruptcy.

Credit Counseling/Debtor Education
Under the new law, no individual may be a debtor in bankruptcy unless he or she has received "credit counseling" from an approved nonprofit agency within 180 days prior to the bankruptcy filing date. Moreover, no individual can receive a Chapter 13 discharge unless the debtor has also completed an education course in personal financial management, approved by the U.S. Trustee.

Homestead Exemption
A debtor may use his state's homestead exemption, provided that he has resided in that state for the two years preceding the bankruptcy filing. If the debtor has moved into the state within the two-year period, his state of domicile will be the state in which he resided for the majority of the six-month period preceding the two-year period. The intent is plainly to prevent debtors from frustrating impending creditor actions by moving to states (such as Texas and Florida) which have unlimited homestead exemptions. In addition, there is a cap of $125,000 on

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